# IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT KNOXVILLE

Assigned on Briefs June 24, 2009

### STATE OF TENNESSEE v. JONATHAN FORTENER

Direct Appeal from the Criminal Court for Monroe County No. 06324 Amy A. Reedy, Judge

No. E2008-01775-CCA-R3-CD - Filed March 31, 2010

Appellant, Jonathan Fortener, was indicted by a Monroe County Grand Jury on one count of felony murder in the perpetration of aggravated child abuse. The victim was the appellant's infant son, Austin Fortener. At trial, a jury found the appellant not guilty on the charge of first degree murder, but convicted him of the lesser-included offense of second degree murder. The trial court imposed a twenty-five-year sentence. On appeal, the appellant challenges the sufficiency of the evidence. We affirm.

### Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA McGee Ogle, J., delivered the opinion of the court, in which Joseph M. Tipton, P.J., and James Curwood Witt, Jr., J., joined.

Richard Hughes, Cleveland, Tennessee, for the appellant, Jonathan Fortener.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Robert Steven Bebb, District Attorney General; and Andrew Freiberg, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION I. Factual Background

The testimony at trial revealed that when Cynthia Fortener, the appellant's wife, left for work on August 10, 2004, her three and a half month old son, Austin, appeared to be a perfectly healthy infant. He was well-nourished and well-developed. She left Austin with his father, the appellant, at about 2:15 p.m. Around 6:45 p.m., the appellant called Mrs. Fortener saying Austin had fallen off the couch and that he did not know what to do. At Mrs. Fortener's direction, he called a pediatric nurse, who eventually told him to take Austin to the hospital. Mrs. Fortener returned home, and they took Austin to East Tennessee Children's Hospital in Knoxville. During the trip, Austin was inconsolable and screaming. Along the way, the couple concocted a story to explain how Austin got hurt. Rather than falling off the appellant's chest while the two slept on the couch, which was their

explanation at trial, they decided to say that Austin fell when he was alone on the couch and the appellant was in the kitchen getting a drink. Either way, they said Austin fell from the couch and hit his head on the carpeted, but very hard, floor.

The severity of Austin's injuries did not match the Forteners' story. Austin had massive head injuries and extensive bleeding throughout his brain. He also had hemorrhages in the retinas of both eyes. Upon seeing these injuries and hearing the purported explanation, the physicians caring for Austin became suspicious. They believed Austin had in fact suffered from "shaken baby syndrome," a dangerous condition that arises in children who have been severely and violently shaken. They contacted law enforcement, who traveled to the hospital to investigate the situation.

Austin's injuries proved fatal. He was declared dead on the morning of August 12. The investigation quickly turned to the appellant, and he was eventually indicted on a charge of felony first degree murder for the death of his son.

At trial, the State presented testimony from law enforcement officers, child services agents, and medical professionals. The State's proof began with Officer James Shaw. At the time of trial, Detective Shaw was a patrol officer with the Madisonville Police Department. However, in August 2004, Detective Shaw was a Detective Sergeant with the Monroe County Sheriff's Department, where he had worked, with the exception of two years, since 1997.

Detective Shaw was called to Children's Hospital on August 10 to investigate Austin's injuries. Detective Shaw and Detective Jennifer Bledsoe, also of the Monroe County Sheriff's Department, were joined at the hospital by Marina Martin and Millicent Thomas from the Department of Children's Services (DCS). The group first spoke to the doctors treating Austin and then spoke with Austin's parents.

The appellant agreed to speak with Detective Shaw. He was not under arrest at the time. Early in the morning on August 11, the appellant dictated the following statement to Detective Shaw:

About 4:30 or 5:00 o'clock I went to the kitchen to get a glass of tea. While in the kitchen, I heard a boom. I went straight back into the living room and Austin was screaming. Austin had feel [sic] off the couch [sic] Austin was sleeping on the couch. Austin fell off my friends [sic] (Franklin Walker) couch in Sweetwater Saturday. Austin had a nickole [sic] size bump on his head. Getting back to Tuesday now. Austin was good all day today. Actually, he has been great for the last two weeks. His formula finally got straight. When Austin would not stop crying I called my wife (Cynthia) at work. I told her Austin fell off the couch and would not stop crying. She told me to call the on call nurse in Vonore. I told the nurse what happened and she said to take him to the hospital. My wife came home. We then went to Childrens in Knoxville.

The appellant told Detective Shaw that Austin fell off the couch in the family home in Vonore, and he executed a waiver allowing law enforcement to search the home.

The State next called Detective Bledsoe.<sup>1</sup> Like Detective Shaw, Detective Bledsoe testified that the investigation team first met with Austin's doctors when they arrived at the hospital on the night of August 10. They were called to the hospital because the doctors were concerned that Austin's injuries were too severe to have been caused by the fall his parents described. The group split up to speak with the family, and Detective Bledsoe was assigned to speak to Mrs. Fortener. During that interview, Mrs. Fortener signed a consent form allowing the investigators to search her home.

After their initial investigation at the hospital, Detective Bledsoe and Detective Shaw traveled to the Fortener home. While there, they took pictures of the couch and the living room. They determined that the distance from the seat of the couch to the floor was 20 inches, which Detective Bledsoe conceded would make a fall from the appellant's chest approximately 26 inches if he were lying on the couch. Detective Bledsoe noted that the home was neat and clean. She recalled that it contained baby toys and other baby items. She also recalled that the living room was carpeted, but it was a thin layer of carpet placed over a very hard surface.

The investigation team returned to the hospital around 9:30 a.m. on August 11 and met with Austin's doctors to get an update on his status. At that point, the doctors did not expect Austin to live, and the appellant became a suspect.

Detective Bledsoe and Detective Shaw interviewed the appellant again. This time, they began by reading the appellant his <u>Miranda</u> rights and asking him to waive those rights, which he did. Detective Bledsoe testified that throughout their interviews, the appellant was cooperative. The appellant dictated the following statement, which begins immediately after Austin's fall:

I picked up Austin and I was scared. It all happened so fast. I don't know how I picked him up. I shook him and rocked him and tried to calm him down. I never got mad at him. I didn't take my time picking him up. He cried for about 15 minutes and then he acted like he wanted to go to sleep. I was trying to keep him awake and calm. I was bouncing him up and down in my arms. I did it for a while and then about 6:30 pm [sic] he started screaming again. I called my wife and the nurse and we brought him here. He cried all the way here. He didn't calm down until the dr.'s [sic] gave him medicine. I was in the back seat with him all the way up here. I would never hurt my boy, never. After it happened a friend of mine and her husband came by and I asked her if Austin looked OK because she has three kids and she said he looked fine, just acting like he wanted to rest. They were there right after it happened. I don't know where they live. I told them what happined [sic] and she looked at him and said he seemed fine, just tired. All he wanted to do was sleep. It wasn't anything purposeful, that boy is my life. It's a natural instinct to pick him up

At the time of the 2008 trial, Detective Bledsoe had been a detective in the Monroe County Sheriff's Department for approximately one year. Prior to that she worked for DCS and as an investigator for the Sheriff's Department. The record is not clear as to her position at the time of Austin's death, but we refer to her as "Detective Bledsoe" for clarity.

and I did as soon as I could. I don't know what too hard is. I picked him up when he fell and I walked around shaking Austin to calm him. I wasn't shaking him to hurt him. I was shaking him to console him. I probably picked him up more forcefully than I was shaking him. I never noticed his head snap or anything. He just wanted to close his eyes. I've always been told not to let a baby go to sleep if they've hit their head. If his head shook any it was from me rocking and bouncing him. No one else had Austin that could have hurt him. He was with me and my wife. The only thing I can think of is after he fell. He wouldn't even hold his head up. All he wanted to do was sleep. The only time his head bounced at all was when I was holding him trying to console him. It was after my wife got home and his head was hanging on my arm. It didn't matter how I held him, he still cried. His head flopped around while I was rocking him some. When I held him to my chest I put my hand on his head and it seemed to hurt him worse so I stopped putting my hand on his head. I was bouncing him pretty fast and his head was moving. I had my hand behind his head when I picked him up. When I was rocking him his head would just fall. I never held him out in front of me. I shook him very lightly not even under his arms or picking him up to try and keep him awake.

After giving the statement, the appellant used a doll to re-enact how he held and shook Austin. His re-enactment was not violent.

Finally, Detective Bledsoe noted that she took pictures of Austin. She photographed a bruise on Austin's buttocks and a small mark on his hand, but she did not know how he acquired the marks.

The State then called Dr. Paul Jones to the stand. Dr. Jones, a pediatrician at Children's Hospital, received his undergraduate degree at Tennessee Technological University in Cookeville and his medical degree at the University of Tennessee College of Medicine in Memphis. He completed a pediatric residency at the University of Mississippi and had been board certified in pediatrics since 2000. At the time he examined Austin, Dr. Jones was working as a consultant for Children's Hospital Child Abuse Service, a group of doctors who agreed to render opinions and second opinions regarding potential child abuse. Dr. Jones stated that his work consulting for the Child Abuse Service gave him more experience in child abuse cases than a general pediatrician.

Dr. Jones testified that he had seen between two and three dozen shaken baby syndrome cases in his career. He said the cases are generally diagnosed by reference to three things: bleeding in the brain, swelling of the brain, and retina hemorrhage. He explained that children are more vulnerable to shaken baby syndrome because of their weak necks and their disproportionately large head size. Dr. Jones explained that the syndrome is not totally understood, but it is thought to result from violent shaking causing rotational force around the neck. Nothing else causes these three particular injuries together, other than perhaps a violent accident such as a car crash. Dr. Jones noted that shaken baby syndrome could be considered a type of "whiplash," but he explained that the forces necessary to cause the types of injuries associated with shaken baby syndrome would need to be "severe and violent." Shaken baby syndrome, he explained, usually involves the tearing of the small

blood vessels in the brain as the brain is moving within the head; it is not usually the result of an impact to the skull.

Dr. Jones examined Austin on August 11 in Children's Hospital's Pediatric Intensive Care Unit (ICU) because the chief doctor in charge of Austin's care, Dr. Joseph Childs, requested assistance from the child abuse team. When Dr. Jones first saw Austin, he was intubated and on a breathing machine. He was three months and fourteen days old and "critically ill." Dr. Jones noted Austin had a red "blister like" lesion on his hand and a bruise across his bottom. He inspected Austin's eyes and noted "a lot of retina hemorrhage in both eyes." Dr. Jones explained that retina hemorrhage is bleeding in the layer of cells that line the inside of the eyeball. He also explained that retina hemorrhages in children typically indicate "a case of abusive injury rather than accident." Austin's charts showed that he had bleeding around the brain and that his brain was "very swollen." A CT scan showed Austin had a subdural hematoma, i.e., bleeding around his brain. Dr. Jones testified that these three traits—bleeding around the brain, swollen brain, and retina hemorrhage—meet the criteria for a diagnosis of "shaken baby syndrome." Dr. Jones characterized Austin's injuries as "devastating."

After his initial examination, Dr. Jones interviewed Austin's parents for about 30 minutes. They told him that Austin seemed to be fine on the morning of August 10. Mrs. Fortener put Austin down for a nap around 2:15 p.m. and went to work. Austin woke up sometime later, and the appellant cared for him throughout the day. Around 4:30 p.m., the appellant went to the kitchen to get water and laid Austin on the couch. When he was in the kitchen, he heard a thump and then crying. The appellant ran back to find Austin on his back and crying loudly. The appellant did not see any injuries on Austin, but he continued to cry for about 15 minutes. Austin began to cry again around 6:30 p.m., and this time the appellant was unable to console him. The appellant eventually called Mrs. Fortener at work and then the pediatrician's office. Still unable to soothe Austin, the Forteners decided to take him to the hospital. The appellant did not say that Austin was on his chest when he fell, nor did he say anything about shaking Austin.

Dr. Jones described the appellant as detached and not overly concerned during the interview. However, he acknowledged that he did not know the appellant, his demeanor, or how he reacted in stressful situations, and he agreed that the appellant was cooperative and came to the hospital seeking help for Austin. Nevertheless, Dr. Jones testified that he had interviewed thousands of families and had seen a variety of reactions, and he was struck by the appellant's detachment. He said that the appellant "seemed to have no interest in what was going on."

Dr. Jones testified that Austin's injuries presented a "textbook" case of shaken baby syndrome, noting the existence of the three key symptoms as well as the bruise on Austin's bottom. He stated that Austin's injuries could not have been caused by a fall from the couch or by a care giver "bobbing" or soothing him. Dr. Jones said that he could not "fathom" an "accidental" cause for Austin's injuries, and he testified to a "medical certainty" that Austin's injuries were not caused by a fall from the couch. Rather, he concluded that the force necessary to cause Austin's injuries would be such that a layperson witnessing it would be concerned for Austin. Dr. Jones testified that

he thought "this is a very clear case of 'shaken baby syndrome," with some type of impact causing the bruise on Austin's buttocks. Dr. Jones was not certain whether Austin suffered a pure "shaken baby syndrome" or if his injuries were properly classified as a "shaken impact" case, where the "impact" would have been the cause of the bruise on Austin's buttocks.

On cross examination, Dr. Jones conceded that Austin did not have any fractured bones, nor did he have any patechiae, tiny blood vessel bursts under the skin.

The State's next witness was Dr. Joseph Childs, the Medical Director of the Pediatric ICU and the Vice President of Medical Services at Children's Hospital. Dr. Childs received his medical degree in 1980 and completed his residency at the University of California in 1983. He then served as the Chief of Pediatrics at an Air Force base in Texas until 1987 and also maintained a private practice in Dallas. In 1988 he came to East Tennessee. He said he was board certified in Pediatrics and in Pediatric Emergency Medicine. Dr. Childs stated that his practice was limited to the care of critically sick or injured children and that he was trained to identify the causes of children's injuries. He had testified in court approximately 75-100 times and had been declared an expert by courts, including the trial court in this case.

Dr. Childs testified that he was familiar with shaken baby syndrome and shaken impact syndrome. He explained that shaken baby syndrome was first described in the 1970s after being identified because of a number of children with bleeding around the brain, severe injury to the brain itself, and retina hemorrhage. These children were linked to a particular nurse who shook them in an attempt to quiet them. The subsequent analysis of shaken baby syndrome led to the discovery of three critical traits—a "classic triad" of symptoms—in most shaken baby syndrome cases: (1) retina hemorrhages; (2) diffuse swelling or injury to the brain; and (3) hemorrhages around the brain. These injuries are the result of the brain jostling around in the skull and tearing the blood vessels in and around the brain. Dr. Childs said that he saw approximately one shaken baby syndrome case per month. He estimated that he had seen somewhere between 100 and 200 cases throughout his career. He estimated that about one-third of violently shaken babies die; one-third have severe brain injury; and one-third have limited or no long-term effects.

Austin came under Dr. Childs' care on August 10, after his initial evaluation and treatment in the emergency room at Children's Hospital. Although Austin appeared to be well-nourished, well-developed, and clean, by the time Dr. Childs first saw him the only hope was to contain the damage Austin had suffered. When Dr. Childs first encountered him, Austin had a tube in his windpipe, was connected to an IV, had a stomach tube, and was somewhat pale. Because of the medications administered to Austin, Dr. Childs was not able to assess his motor skills; however, Austin's eyes were at least partially reactive to light. Austin suffered from retina hemorrhages in both eyes, which Dr. Childs thought was significant because it did not match what he was told regarding the cause of Austin's injuries and what appeared to be a fairly fresh bruise on his buttocks. The "soft spot" on the top of Austin's head was not depressed, as it would be in most infants, but was bulging, indicating pressure around the brain.

In addition to his physical examination, Dr. Childs reviewed an alarming CATscan. Dr. Childs explained that in a normal CAT scan of the brain, there will be a distinction between "gray" matter and "white" matter. In Austin's scan, however, that distinction was "obliterated"; his entire brain was "black looking." Austin's brain had "almost no normal architecture." Dr. Childs interpreted the image to mean that Austin's brain was swollen and that its surface was covered by a thin layer of blood. The blood extended over both halves of the brain. These injuries were "very life threatening," and Dr. Childs said that, on a scale of one to ten, their seriousness was a ten.

Within hours of Austin's admission into the Pediatric ICU, his condition deteriorated. His pupils lost all reactivity. He had no gag reflex or cough response. He did not even blink when a piece of cotton was rubbed across his eyes. He had no spontaneous movement, no physical signs of brain activity, and his EEG showed no electrical brain activity. While Austin was under his care, Dr. Childs consulted with physicians specializing in neurosurgery, pediatric ophthalmology, and pediatric neurology in an attempt to help Austin. No one could. Ultimately, Austin's brain injuries caused his death.

Dr. Childs interviewed Austin's parents to find out how Austin suffered his injuries. The appellant told him that Austin fell from a couch when the appellant had stepped out of the room. When the appellant found him, Austin was on his back and crying. He was irritable the rest of the afternoon and refused to take a bottle. The appellant explained that he contacted Mrs. Fortener, and the three came to the hospital. The appellant did not tell Dr. Childs that Austin was sleeping on his chest when he fell. He did not say he shook or jostled Austin at any point.

Dr. Childs testified that the appellant's explanation for Austin's injuries was "not even close" to matching the physical findings. Dr. Childs noted that if a fall caused severe brain injury to a child, the child would lose consciousness immediately. The appellant said Austin did not lose consciousness; he said Austin began to cry immediately. Moreover, Dr. Childs described extensive literature concluding that dropped babies generally do not suffer retina hemorrhages, nor do falls generally cause the diffuse swelling found in Austin's brain. Dr. Childs opined that such injuries might be associated with motor vehicle accidents or falls from multi-story buildings—or "if this child was dropped repeatedly from a . . . 5th story window." They would not result from falls from a "routine" height or from a caregiver's attempt to soothe or bounce him. According to Dr. Childs, the type of fall the appellant described may result in bumps or skull fractures, even fractures with some blood under the skull, but they will not cause subdural or subgeleal hemorrhaging, and "certainly not" retina hemorrhages. In responding to counsel's question whether he could say with a degree of medical certainty that Austin's injuries were not caused by falling from a couch, Dr. Childs testified that he "cannot state strongly enough that [such a fall] could not explain that."

Dr. Childs concluded that "violent shaking had to have occurred" to get the combination of diffusing injury and swelling to the brain, bleeding around the brain, and retina hemorrhages that Austin suffered. In his "absolute opinion," these injuries came from "violent shaking." The force would have to have been exerted over "a number of seconds." Dr. Childs testified that the damage could have been done in 30 to 60 seconds but that it would have been hard to accomplish in 5

seconds. Regardless of the duration, Dr. Childs said the critical factor was the need for multiple repetitions in shaking the child back and forth, and Austin would have to be subjected to a force so severe that "any reasonable person would [have] recognize[d it] as harmful." As Dr. Childs explained, that meant Austin's injuries were the result of "intentional and abusive" treatment. He stated that Austin would probably not have been crying at the end of the shaking because by that point his brain would have been "scrambled."

Dr. Childs was unable to pinpoint the time when Austin incurred his injuries. He noted, however, that Mrs. Fortener said Austin was acting normally when she left for work. Dr. Childs concluded that meant the injuries occurred after she left for work. He also noted that, after the injuries were inflicted, anyone who "spent any time" with Austin would have known something was wrong; however, if Austin were asleep, then an observer might not notice any cause for concern.

The State next called Marina Martin, a Child Protective Services Investigator for DCS. She was called to Children's Hospital, along with Millicent Thomas, to investigate Austin's injuries on August 10. She was present during the appellant's initial interview, and she recalled that the appellant said he was home with Austin because the appellant had his own doctor's appointment earlier that day, although he did not attend it. The appellant said that Mrs. Fortener left for work around 2:00 p.m., leaving Austin alone with the appellant. The appellant told Ms. Martin that he left Austin asleep on the couch in the living room and went to get tea around 4:30 or 5:00 p.m. He heard a "boom," and when he returned to the living room he found Austin on the floor crying. The appellant said he picked Austin up and tried to console him. He did not say that Austin was asleep on his chest at the time he fell off the couch.

The State's final witness was Dr. Thomas Deering, the physician who performed the autopsy on Austin. Dr. Deering, a forensic pathologist, completed a pathology residency in Milwaukee, Wisconsin and served as a Fellow in Forensic Pathology at the Regional Forensic Center in Memphis. In 1997, he was the Assistant Medical Examiner for Shelby County. At the time of trial, he was an Assistant Medical Examiner with Forensic Medical Management Systems, a private company that was contracting with the State Medical Examiner's Office for forensic services.

Dr. Deering described his job as primarily determining the cause of death. He testified that he was trained to identify injuries in autopsies and to diagnose their causes. Dr. Deering had performed approximately 2000 autopsies, had testified many times in several different courts, and had been qualified as an expert.

Dr. Deering performed the autopsy on Austin on August 14. He described Austin as a well-nourished, 18-pound, three and a half month old child. His external exam revealed a small, swollen abrasion on the left lateral side of Austin's head. Dr. Deering noted that this injury could have been caused by a fall from a couch. In addition, he noted a faint contusion on both sides of Austin's buttocks. Dr. Deering concluded that this bruise was caused by an injury; it was not just a pooling

of blood. This injury also could have been caused by a fall from a couch or by an impact during an episode of shaking.

With respect to the internal exam, some of Austin's organs were harvested, so they were not available for inspection. As noted above, Austin had an abrasion on the left lateral side of his head, but the internal exam showed that there was no blood around the abrasion, just edema fluid. In other words, there was not a large bruise under the bump on the left side of Austin's head. There were no fractures on Austin's skull. However, there were several other injuries to Austin's brain. Austin had a subgaleal hemorrhage, a bruise across the back of his head. He also had small diastasis on the left coronal suture. Dr. Deering explained that babies' skulls are not yet fused together, so there are fault lines between skull bones. In Austin, those fault lines had been pulled apart by his swollen brain. There was also hemorrhaging along those fault lines. He had a bilateral subdural hemorrhage. Dr. Deering noted that the dural is a tough membrane surrounding the brain. A "subdural hemorrhage" is, therefore, bleeding under the dural membrane. Austin's bleeding was "bilateral," meaning that he had bleeding on both sides of his brain, which Dr. Deering described as abnormal. Austin also had a subdural hemorrhage inferior to the cerebellar hemispheres, meaning that he also had bleeding toward the back and underneath his brain. Dr. Deering noted that Austin's brain was swollen and that, in addition to the subdural hemorrhage, Austin suffered a subarachnoid hemorrhage. He explained that the subarachnoid space is the area surrounding the brain that holds cerebral fluid. In Austin's brain, there was blood in this space. Dr. Deering also found hemorrhages near Austin's optic nerves and several retina hemorrhages as well.

Dr. Deering testified that he found three injuries—subdural hemorrhages, subarachnoid hemorrhages, and retina hemorrhages—that indicated Austin suffered "shear injuries or rotational forces of the brain." Dr. Deering explained that "shearing injuries" occur when one part of the brain is moving faster than another part, causing the veins connecting the parts to tear. Austin's brain had "significant shearing injuries," which caused a "severe amount of swelling" in his brain and even pushed the bone sutures apart.

Dr. Deering concluded that Austin's brain injuries were not caused by an accidental fall. He noted than an accident might cause one of the three types of injuries, but the confluence of all three indicated that Austin suffered from shaken baby syndrome. Austin's head had to have been moving from side to side or back and forth in order to cause these injuries. Dr. Deering testified that the force with which Austin's head was moving would have been greater than that necessary to throw Austin up in the air and catch him. It would have been more force than necessary to swing him, and it would have been more force than from a fall from a small height. Furthermore, in order to get the shearing injuries Austin suffered, there needed to be rotation in the force. He said that only something like a car accident could provide an accidental cause for Austin's injuries. They were not injuries that could have arisen from a caregiver trying to soothe Austin. Dr. Deering therefore listed Austin's cause of death as "inflicted head trauma," and he indicated that Austin was "assaulted by another." While the injuries could have occurred in a matter of seconds, Dr. Deering acknowledged that it may have taken 1 to 2 hours to realize that Austin was injured.

The defense first called Franklin Walker to the stand. Mr. Walker testified that he was a friend of the Fortener family and had been with them on several occasions. In particular, Mr. Walker had been with Austin twice in the days leading up to his death. First, on the Friday before Austin's death, Austin and the appellant came to Mr. Walker's home. While there, Austin fell off a couch. The appellant was sitting with him when he fell. Mr. Walker said that Austin did not cry right away, the fall had knocked the breath out of him. Mr. Walker recalled that the appellant "panicked just slightly," but a friend blew in Austin's face and Austin began to breathe again. Austin then took a bottle and appeared to be normal. On the Sunday before Austin's death, the appellant, Austin, and Mrs. Fortener came to the Walker home. Mr. Walker testified that it was a normal visit and that nothing unusual happened to Austin while they were there. Mr. Walker was not with the appellant or Austin on August 10.

Mr. Walker testified that he never saw the appellant be aggressive with Austin, nor did he ever see him get abnormally frustrated with him. He also noted that while he knew the appellant would drink alcohol, he had not seen him do so since the appellant was involved in an accident several weeks before Austin's death.

The defense then called Mrs. Fortener to the stand. Mrs. Fortener said that she met the appellant in Michigan 11 years before the trial in this case. They moved to Monroe County in 2003 and were married in April 2004. Austin was born later that month. The three lived together in their Vonore home. Mrs. Fortener testified that the appellant was involved in an automobile accident in June 2004, in which he suffered broken cheek bones and had his jaw wired shut. Because Mrs. Fortener was working while the appellant recovered from the accident, the appellant stayed home to care for Austin.

Austin was the couple's first child together. Mrs. Fortener described Austin as a good, albeit colicky, baby. She noted that Austin ate well. She also testified that the appellant was a "great" father. She had never seen the appellant become angry with Austin, and she had never seen the appellant do anything to Austin that concerned her. He was "a great father, very good, loving, [and] caring." He helped with Austin's feedings and putting him down. In fact, she said, the two spent about the same amount of time caring for Austin. For her part, Mrs. Fortener denied that she was ever physically fearful of the appellant. Mrs. Fortener recalled visiting the Walker home on the Friday before Austin's death. While there, Austin fell off a couch.

Mrs. Fortener acknowledged, however, that she had previous difficulties with the appellant's behavior. She recalled that she once came home from work to find Austin crying and the appellant asleep. The appellant had prior drinking problems, so Mrs. Fortener wrote the appellant a note begging him not to drink while he was watching Austin. Mrs. Fortener said she never saw the appellant drink again until after Austin's death. She did not think he had been drinking the day Austin was injured.

Mrs. Fortener testified that she went to work at around 2:15 p.m. on August 10. When she left, she had no concerns about leaving Austin with the appellant. She said that they had not been arguing.

The appellant called Mrs. Fortener at work about 6:45 p.m. He told her that Austin had fallen off the couch and that he did not know what to do. Mrs. Fortener instructed the appellant to call the on-call pediatric nurse. Eventually they decided to take Austin to the hospital, so Mrs. Fortener returned home. When she got there, Austin refused to take a bottle and was screaming. Austin's cry was different, and Mrs. Fortener was scared.

On the way to the hospital, Mrs. Fortener and the appellant discussed how Austin was injured. The appellant told her that Austin fell off of his chest while the two were sleeping on the couch. Afraid that the story would "look bad on us," Mrs. Fortener suggested they tell Austin's doctors and law enforcement that Austin fell while the appellant was in the kitchen.

Mrs. Fortener stayed in the hospital from the time they arrived with Austin until they were taken to court on August 12.

Mrs. Fortener said that since Austin's death, she had rarely discussed what happened with the appellant. She said that he cried and did not want to talk about it. However, he did tell her that Austin fell and that when the appellant picked him up, Austin was out of breath. The appellant said he shook Austin a little to get him to breathe again, but he denied shaking him roughly.

The last witness to testify was the appellant. At the time of his trial, the appellant was 28 years old. He was born and raised in Detroit, Michigan. He dropped out of high school in the tenth grade, after fathering his first child at age fifteen. He had a second child when he was sixteen. The appellant met Mrs. Fortener in Michigan seven or eight years before Austin's death. The couple moved to Monroe County between twelve and eighteen months before Austin's death.

The appellant acknowledged he had a significant alcohol problem. He said he began drinking at the age of seventeen, and he was an alcoholic. In June 2004, the appellant was involved in a serious automobile accident. He was alone in the car and was drunk. He hit a culvert and the car flipped. The appellant shattered bones, broke his upper jaw, chipped his hip, and bruised his ankle. No one else was injured. He was unable to work for some time and was under a doctor's care. The appellant testified that he had not consumed any alcohol between the accident and Austin's death.

The appellant recalled taking Austin to the Walkers' house a few days before his death. During the visit, Austin fell off a couch while the appellant was sitting next to him. Austin was struggling to breathe after the fall. A friend took Austin and blew in his face, and the child began to breathe again. After Austin regained his breath, he appeared to the appellant to be fine.

The appellant said that Mrs. Fortener left for work around 2:15 p.m. on August 10. The appellant testified that they parted on good terms, they had not fought, and the appellant was not

angry. He was not upset with Austin, who appeared to be perfectly fine. The appellant testified that he was not drinking that day.

Austin fell asleep on the appellant's chest as the two lay on the couch. The appellant admitted that this was not the story he told hospital and law enforcement personnel. He testified that he was scared to tell them the truth because he thought it might sound bad. He said he had placed Austin on his chest in an attempt to get him to go to sleep. The two fell asleep and Austin fell from the appellant's chest onto floor. The fall woke the appellant. Austin was gasping for air, but nothing else appeared to be wrong with him.

The appellant picked Austin up and shook him to get him to breathe again. The appellant admitted he shook Austin with the force described by the doctors, but, he testified, he was not aware he was using that much force. He said he was not mad at Austin; he was trying to keep him awake because he thought Austin had hit his head. The appellant said he only saw Austin's head moving back and forth when he initially picked him up, and he was not worried about how he handled Austin. He said he was simply scared that Austin was not breathing. The appellant did not know how Austin got the bruise on his buttocks. He did not throw Austin on the couch or the ground.

The appellant said that Austin's crying stopped after about 15 minutes. He did not want a bottle. Some friends stopped by the house for about 20 minutes after Austin had calmed down. The appellant asked one of them to look at Austin, who was in his crib whimpering. She said Austin looked fine.

The appellant recalled that Austin woke up screaming around 6:30 p.m. Unable to calm him, the appellant called his wife and then a nurse. Eventually they decided to take Austin to the hospital. In the car on the way to the hospital, he told Mrs. Fortener the truth about Austin falling off his chest onto the floor. Mrs. Fortener thought they should tell a different story, one that reflected less poorly on them. The appellant explained that when he demonstrated to law enforcement how he handled Austin, he showed them three ways he held Austin, but he did not show that he shook him.

While the appellant acknowledged that he shook Austin, he said he did not realize his actions would hurt him. His hands were under Austin's arms, but he did not realize Austin's head was moving back and forth when he shook him. The appellant testified that he was conscious and aware of what he was doing. He knew Austin was being shaken, he just did not think the shaking would hurt him. As the appellant put it, he did not "know what too hard is." The appellant said he was sober. When asked if he felt responsible for Austin's death, the appellant said he was "[i]n sort of kind of a way."

At the conclusion of the trial, the jury found the appellant not guilty on the charge of first degree felony murder. Instead, they found the appellant guilty of second degree murder. The appellant timely appealed, arguing that there was insufficient evidence to support the jury's verdict.

### II. Analysis

On appeal, a jury conviction removes the presumption of the appellant's innocence and replaces it with one of guilt, so the appellant carries the burden of demonstrating to this court why the evidence will not support the jury's findings. <u>State v. Tuggle</u>, 639 S.W.2d 913, 914 (Tenn. 1982). He must establish that no "reasonable trier of fact" could have found the essential elements of the offense beyond a reasonable doubt. <u>Jackson v. Virginia</u>, 443 U.S. 307, 319 (1979); <u>see also Tenn. R. App. P. 13(e)</u>.

Accordingly, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). In other words, questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, and not the appellate courts. State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990).

A guilty verdict can be based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. See State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999); State v. Dykes, 803 S.W.2d 250, 253 (Tenn. Crim. App. 1990), overruled on other grounds by State v. Hooper, 29 S.W.3d 1, 9 (Tenn. 2000). Although a guilty verdict may result from purely circumstantial evidence, in order to sustain the conviction the facts and circumstances of the offense "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the [appellant]." State v. Crawford, 470 S.W.2d 610, 612 (Tenn. 1971).

Under Tennessee law, second degree murder is defined, in pertinent part, as the "knowing killing of another." Tenn. Code Ann. § 39-13-210(a). See also Tenn. Code Ann. § 39-13-201. The Code further provides that a person acts knowingly "with respect to the conduct… when the person is aware of the nature of the conduct" and that "[a] person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result." Tenn. Code Ann. § 39-11-302(b). This intent can be demonstrated by both "direct evidence" and also "may be deduced or inferred by the trier of fact from the character of the assault, the nature of the act and from all the circumstances of the case in evidence." State v. Inlow, 52 S.W.3d 101, 105 (Tenn. Crim. App. 2000).

The appellant argues that the State failed to demonstrate that he knowingly killed Austin. In particular, he contends that, while the evidence indicates he panicked and shook his son, he did not know that his actions would harm him. In support of this position, he cites this court's decision in State v. David Harold Hanson, No. E2006-00883-CCA-R3-CD, 2007 WL 2416103, at \*8 (Tenn. Crim. App. at Knoxville, Aug. 27, 2007), which was reversed by our supreme court. See State v. Hanson, 279 S.W.3d 265 (Tenn. 2009).

The supreme court's opinion came down after the appellant filed his initial brief, but before the State filed its response. Hanson was one of only a few substantive cases cited by the appellant. Neither party cited the supreme court's decision to us in this case.

The appellant's argument is unpersuasive. The medical evidence against the appellant was clear, consistent, and devastating. All three doctors testified that, short of a violent motor vehicle accident or a fall from a multi-story building, the combination of injuries Austin suffered could only have been caused by severe and violent shaking. They specifically testified that the appellant's proffered explanation—a fall from the couch—could not have caused Austin's fatal injuries. Likewise, normal play or efforts to soothe could not have caused the injury. The doctors agreed that only severe and violent shaking could have caused Austin's terrible injuries. In their opinion, it was treatment that any rational person would recognize as threatening to Austin's well-being.

The evidence also establishes that the appellant was the only person that could have injured Austin. Indeed, the appellant said that he was the only person with access to Austin when he sustained his injuries. Mrs. Fortener consistently corroborated that story.

The evidence further establishes that the appellant was sober and conscious and that he admitted he shook Austin. Although the appellant denied knowing that shaking Austin would harm him, he was nevertheless clear-headed when he did. In other words, he was aware of what he was doing, but he was unaware of its consequences.

Taken in the light most favorable to the State, the evidence demonstrates that the appellant knowingly killed Austin. He was the only person with Austin at the time, and the doctors explained that Austin had to have been shaken violently and repeatedly. Moreover, Dr. Childs testified that any reasonable person would have realized that the severe shaking was harmful. While the appellant denied knowing his conduct would harm Austin, the jury chose to discredit his testimony. Therefore, the evidence was sufficient to allow the jury to find the appellant guilty of second degree murder.

### **III. Conclusion**

Upon review of the record and the parties' briefs, we conclude there was sufficient evidence for the jury to convict the appellant of second degree murder. We therefore affirm the judgment of the trial court

NORMA McGEE OGLE, JUDGE